Supreme Court of the United States

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS .... *Petitioner*

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY .... *Respondents*

BRIEF OF PETITIONER

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PARAGON PRINTING CO., LITTLE ROCK

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STATEMENT OF THE CASE

The Commissioner of Revenues of the State of Arkansas brought separate suits against J. E. Dilworth Company and Reichman-Crosby Company of Memphis, Tennessee, to require them to collect and pay to the Commissioner of Revenues the sale tax levied by Act 154 of the Acts of the General Assembly of Arkansas for the year 1937, as amended, and similarly to collect and pay the sales or gross receipts tax levied by Act 386 of the Acts of the General Assembly of Arkansas for the year 1941 (which latter act repealed Act 154 of 1937 as amended (R. 1-4, 12-15). The cases were consolidated for trial (R. 20-21).

According to the facts admitted by way of answer or by stipulation: Each of the defendants (in the separate cases) are foreign corporations, not qualified to do business in Arkansas and having no place of business here. Orders for merchandise are taken by traveling salesmen from customers in Arkansas, subject to acceptance by the Company at Memphis, and orders are received by mail and telephone at Memphis from customers in Arkansas. When these oredrs are accepted the merchandise is shipped by common carrier direct to the purchaser in Arkansas, f.ob. Memphis, purchaser paying the freight (R. 7-9; 9-11; 15-18).

The tax sought to be collected is two per cent (2%) of the proceeds derived by the defendants from sales to purchasers in Arkansas where delivery was finally made to the purchasers in Arkansas (R. 1-4, 12-15).

The regulations of the Commissioner of Revenues providing for the collection of the tax under each of the

pertinent acts are set forth at length in the appendix to the brief in support of petition for certiorari.

The defense of each of the parties was as follows:

(1) The regulation of the Commissioner of Revenues of Arkansas providing for the collection of the tax was beyond the scope and intent of either of the acts under which the taxes were sought to be collected, and therefore the regulation was invalid and the Commissioner of Revenues was without authority under either of said acts to collect the taxes on transactions of the sort involved.

(2) The collection of the tax was a violation of the Constitution of the State of Arkansas.

(3) The collection of the tax was a violation of the Commerce Clause and the Due Process Clause of the Constitution of the United States (R. 7-9; 15-18).

Upon trial of these causes in the lower court, a decree was rendered dismissing the complaints of the Commissioner of Revenues in each of the cases (R. 11-12; 19).

Upon appeal of the causes to the Supreme Court of Arkansas, the decision of the lower court was affirmed and petition for rehearing denied (R. 22; 31). The decision was predicated upon the conclusion of the court, stated in its opinion, that a sales tax could not be levied upon transactions of the sort here involved because it would be a burden on interstate commerce and therefore in violation of the Commerce Clause of the Constitution of the United States (R. 22-28).

The petitioner petitioned this Honorable Court for a writ of certiorari to be issued to the Supreme Court of Ark-

ansas which was granted and the cause is now before the court for review of the decision of the Supreme Court of Arkansas.

SUMMARY OF ARGUMENT

Point 1

The tax is not an occupation or license tax against the seller, but the tax is levied against the purchaser.

Point 2

Receipt of the goods within the taxing state by the purchaser is subject to the state taxing power, apart from its effect on interstate commerce.

Point 3

The tax is not discriminatory and does not burden interstate commerce.

Point 4

Jurisdiction of the seller is not a question in issue.

ARGUMENT

Point 1

The Tax Is Not an Occupation or License Tax Against the Seller, But the Tax Is Levied Against the Purchaser

The tax provided by Act 233 of 1935 and Act 154 of 1937 as amended is commonly referred to as a "sales tax" and sometimes denominated a "retailers sales tax". Since the enactment of Act 386 of 1941 the tax is still referred to as a "sales tax", though called a "gross receipts tax". However, whatever name may be given to the tax levied by any of the said Acts the type of the tax provided by each of the said Acts is essentially the same. The only changes that have been made in the tax since 1935 have been with regard to the scope of the tax and the mechanics of the administration of the law and the collection of the tax.

There are various kinds of so called sales taxes and it is therefore necessary that we examine the taxing Acts involved in these cases and determine what kind of a sales tax is there provided. It should be noted at the outset that the underlying principle common to all sales taxes of whatever form, is the taxation of the gross amounts involved in the sales transactions. In some instances the tax may take even the form of a gross income tax based on income from all sources. In others it takes the form of a gross receipts tax based on sales generally of tangible personal property and oftentimes includes a tax on the proceeds derived from the sale of certain services. At other times the tax takes the form of a tax on gross receipts from only retail sales and/or the retail sales of certain services.

Still at other times the tax takes the form of a tax on gross proceeds derived from the sales of selected transactions or services. Finally, the tax may take the form of a tax on the use of property measured by the price the user paid for the property. This form of tax is often used to supplement a sales tax.

Broadly speaking, it would seem that sales taxes may be classified in two ways dependent upon who pays the tax. Where the tax is measured by the gross proceeds derived from a sale and is to be paid by the purchaser who buys the article for use and consumption and not for resale, the tax is usually denominated a consumers sales tax. Where a tax, though measured by sales, is upon the seller the tax is an occupation or license tax. An essential element of a consumers sales tax is that the tax is required to be paid by the consumer, even though the seller may be required to collect and remit the tax. Sales taxes in the form of occupational and license taxes are laid upon the privilege of engaging in business and the tax is therefore upon the seller or vendor, notwithstanding that such tax may be passed on by the seller or vendor by adding to the price of the merchandise sold to the consumer.

The Acts of the General Assembly of Arkansas under consideration levied a consumers sales tax. The tax is laid upon the purchaser for consumption as distinguished from a sales tax levied as an occupation or license tax upon the seller.

In the case of *Wiseman* v. *Phillips*, 191 Ark. 63, the Court had under consideration Act 233 of 1935 which in its principal provisions is no different from Act 154 of 1937 or Act 386 of 1941.

To the same effect is the decision of the Supreme Court of Arkansas in the case of *Arkansas Power & Light Company* v. *Roth,* 193 Ark. 1015.

Therefore, the case of *Crenshaw* v. *Arkansas,* 227 U. S. 389, 57 L. Ed. 565, 33 S. Ct. 294, cited by the Supreme Court of Arkansas as authority for its holding that collection of the tax on the transactions involved would burden interstate commerce is not an applicable authority because the tax there involved was a license tax on peddlers. The substance of the opinion in that case was that a tax could not be levied on an interstate occupation or the privilege of engaging in interstate commerce.

Point 2

Receipt of the Goods Within the Taxing State by the Purchaser is Subject to the State Taxing Power, Apart From Its Effect on Interstate Commerce

As far as concerns the question of whether the collection of the tax violates the commerce clause of the Constitution of the United States, since the tax is laid upon the purchaser, it makes no difference where the contract of sale is made or where the title or ownership of the goods is transferred since delivery of the goods was made to the purchaser within the State of Arkansas. Nor does it make any difference as to the manner in which the delivery of the goods was accomplished, or whether the constructive possession of the goods was obtained by the purchaser upon delivery to a common carrier outside the state.

In the case of *McGoldrick* v. *Berwind-White Coal Mining Company,* 309 U. S. 33, 57; 84 L. Ed. 565; 60 S. Ct. 388, apart from the conclusion of the court that the tax there

involved did not burden interstate commerce, the court further held that the tax was conditioned upon a local activity, *delivery of goods within the state upon their purchase for consumption,* which activity, apart from its effect on interstate commerce, was subject to the state taxing power.

Practically this same reasoning was assigned by the court for its decision sustaining the validity of the taxes involved in the earlier cases of *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Wisconsin & Michigan Ry.* v. *Powers,* 191 U. S. 379. In each of these cases it was in effect held that the thing taxed was a valid subject of the state's taxing power and that therefore there was no violation of the interstate commerce clause of the Constitution notwithstanding that the tax was measured by gross receipts from interstate commerce.

Also in the case of *Western Live Stock* v. *Bureau of Revenues,* 303 U. S. 250, this Court sustained a state occupation tax measured by the gross receipts of a publisher derived from the advertising in a magazine with interstate circulation. The Court ruled that the tax was properly imposed on the local occupation of preparing, printing and publishing magazine advertising within the taxing state, and that the gross receipts from the advertising fairly measured the value of the local enterprise.

So it appears from the decisions cited *supra* that this Court has even sustained privilege or occupation taxes where the thing taxed was a valid subject of the state taxing power and was not merely the taxing of the occupation or privilege of engaging in interstate commerce. The rationale of each of these decisions was that the thing taxed

was a local activity, and not the privilege of engaging in interstate commerce.

Likewise, the decisions of this Court sustaining a fixed sum license tax imposed on an agent of an interstate seller for the privilege of selling goods within the taxing state have been largely predicated upon the conclusion that the thing taxed was not the privilege of carrying on interstate business, but that the local activity was subject to the state's taxing power, aside from any question of its effect indirectly on interstate commerce. *Howe Mach. Company* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430; *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663; *Baccus* v. *Louisiana*, 232 U. S. 334, 58 L. Ed. 627; *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157.

In decisions other than the one in the case of *McGoldrick* v. *Berwind White Coal Mining Company*, cited *supra*, this Court has sustained taxes on sales, or has sustained use taxes, measured by gross receipts where the transactions involved interstate commerce, and while in all or some of these cases (particularly those involving use taxes), the primary reason assigned for upholding the validity of the tax was that the thing taxed was the sale or use after the interstate commerce journey had ended, the fundamental theory supporting these decisions was that the thing taxed was a local activity which properly was within the scope of the state's taxing authority. *Gregg Dyeing Company* v. *Query*, 286 U. S. 472; *Heneford, et al.*, v. *Silas Mason, et al.*, 300 U. S. 577; *Graybar Electric Company* v. *Curry*, 308 U. S. 513.

Therefore, it is apparent from a close analysis of all of the decisions cited under this point of the argument

that insofar as concerns the validity of a tax under the interstate commerce clause, it makes no difference whether the tax is in form of a sales or use tax or an occupation or privilege tax so long as the tax levied is predicated upon a local activity which is subject to the state's taxing power and is not levied directly against the occupation or privilege of engaging in interstate commerce.

It is important, however, to keep in mind that in determining whether the particular local activity is a valid subject to the state's taxing power the character or type of tax may be decisive; for example, where the type of tax is an occupation tax, even though it be not a fixed sum license tax but a tax measured by gross receipts derived by the seller; the question of the validity of the tax may properly turn upon whether the taxing state can grant or deny the privilege of engaging in the particular business, and if the business is exclusively interstate then the tax is not valid, notwithstanding there may be certain local activities incidental to the carrying on of the interstate business because a state may not tax the privilege of engaging in interstate business. In other words, it is recognized that where a thing taxed directly affects interstate commerce, local activity alone may not be sufficient to sustain validity of the tax and in such cases the question ultimately to be decided is whether the tax *burdens* interstate commerce. Which proposition is the subject of the following point of this argument.

But where a use tax is involved, or a consumers sales tax, as is here involved the tax is not an occupation tax, but is a tax upon the user or purchaser and no contention could therefore be made that the tax, as levied against such user or purchaser, directly affects interstate commerce.

Of course, there remains the question of the effect on interstate commerce of requiring the interstate seller to collect such sales tax from the purchaser, or use tax from the user. This question will also be discussed under the following point of the argument.

Point 3

The Tax Is Not Discriminatory and Does Not Burden Interstate Commerce

As has heretofore been pointed out the tax under consideration is not an occupation tax or a tax upon the seller for the privilege of engaging in business and the decisions of this Court, such as the case of *Crenshaw* v. *Arkansas*, cited *supra*, holding that a tax may not be levied upon the privilege of engaging in interstate commerce, are not applicable.

Moreover since the tax is to be paid by the purchaser, and the seller is only the collecting agent it would seem clear that the tax is not levied directly on the gross proceeds derived from interstate commerce, but is simply measured by the amount paid by the purchaser to the seller. This Court has never held that state taxes may not be measured by gross receipts from interstate commerce, provided the subject of the tax involved was not objectionable as was pointed out in Point 2 of this argument.

However, it is conceded that this court has, in some instances, condemned taxes from gross receipts from interstate commerce even where the subject of the taxes was within the scope of the State taxing power.

J. D. Adams Manufacturing Co. v. *Storen*, 304 U. S. 307; 82 L. Ed. 1365;

Gwin, White & Price v. *Henneford*, 305 U. S. 434; 83 L. Ed. 272.

But these decisions did not hold that all taxes which were levied on the gross receipts, or measured by the gross receipts, from interstate commerce were invalid, but the particular taxes involved in these cases were condemned because they discriminated against interstate commerce. In each of the cases the tax "was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities in intrastate commerce, were included in the tax, the sale price, without segregation or apportionment".

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 57.

In this connection it should again be pointed out that this court has, in numerous cases, sustained taxes on valid subjects measured by gross receipts from interstate transportation or commerce.

Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217;

Ficklen v. *Shelby County Taxing District*, 145 U. S. 1;

American Manufacturing Co. v. *St. Louis*, 250 U.S. 459;

Western Live Stock v. *Bureau of Revenues*, 303 U.S. 250;

Coverdale v. *Arkansas Louisiana Pipe Line*, 303 U.S. 604, 610;

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 57.

From a study of the decisions cited *supra*, it is apparent that in considering the taxes involved in this case, the question of their validity under the interstate commerce clause of the Federal Constitution depends upon whether the taxes, as levied, discriminate against or burden interstate commerce. In this connection it should be pointed out (1) that the tax is not levied directly on interstate commerce, but is simply measured by the gross receipts of the sale; (2) that the tax is to be collected on all transactions where actual delivery of the goods is made to the purchaser within the taxing state; and (3) the tax is not levied against the seller, but against the purchaser.

It will doubtless be argued by counsel for respondents that the present taxes are invalid because there is a risk of a multitple tax being levied on the same interstate commerce transaction. There is no such threat.

It will be seen from an examination of the regulations of the Commissioner of Revenues relating to each of the Acts involved (Appendix - Petition for certiorari), that no tax is to be collected on sales originating in Arkansas where the goods are to be shipped outside the state; and no question is here presented as to the effect of taxes levied by the state of the seller on these same transactions. A similar proposition was passed up by this court in the case of *Southern Pacific* v. *Gallagher*, 306 U. S. 167, involving the validity of a use tax where the taxing statute allowed no credit for any foreign tax on the sale of the property, and this court said that there would "be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination' ".

Southern Pacific v. *Gallagher*, 306 U.S. 167.

In this connection, see, also, the following cases in which the court has indicated that there is no cumulative burden threat even where there are taxes levied by different states measured by gross receipts from the same interstate commerce transactions, where the taxes levied by the separate states are not on the same activity or, that is, where the taxes levied by the different states are different taxes.

Coverdale v. *Arkansas-Louisiana Pipe Line*, 303 U.S. 604.

Department of Treasury v. *Wood Preserving Co.*, 313 U.S. 62.

See, also

State Taxation Interstate Commerce Clause (1940), 28 Cal. L. Rev. 168, 173, 174.

American Manufacturing Co. v. *St. Louis*, 250 U.S. 459.

Heisler v. *Thomas Colliery Co.*, 260 U.S. 245.

Gross Receipts Taxes on Interstate Transportation and Communication, 57 *Harvard Law Review* 40, 66-70, 74-75, 86-95.

Thus far the argument has been concerned with the validity of the tax (under the commerce clause) as levied against the purchaser to whom the goods were delivered within the State of Arkansas. There is the further question of whether requiring the interstate seller to collect the

tax burdens interstate commerce. This question was decided by this court in the case of

Felt & T. Mfg. Co. v. *Gallagher*, 306 U.S. 62

It was there held that notwithstanding the seller was doing business exclusively in interstate commerce, the commerce clause of the Federal Constitution did not prohibit a taxing state from requiring the interstate seller to collect the tax, provided the taxing state could obtain jurisdiction of such interstate seller. To the same effect is the decision in the case of

Nelson v. *Sears-Roebuck & Co.*, 312 U.S. 359.

Prior to these two decisions, it had been held by this court in the cases of *Gregg Dyeing Company* v. *Query* and *Heneford, et al.*, v. *Silas Mason, et al.*, cited *supra*, that a use tax measured by proceeds from interstate commerce sales was not invalid. The primary question in the *Felt & T. Mfg. Co.* case and the *Sears-Roebuck & Company* case related to whether the interstate seller could be required to collect the tax, and as regards this, it makes no difference whether the tax required to be collected by the interstate seller is a sales or use tax, or some other kind of tax; and in this connection the effect of the decisions mentioned is that the only limitation upon the right of the taxing state to require the seller to act as its collecting agent is that which may arise from "the impotency of the state's power or jurisdiction over the seller".

Point 4

The Jurisdiction of the Seller Is Not a Question in Issue

The respondents answered and defended the suits brought against them to enforce collection of the tax and, therefore, there is no question in issue as to "the impotency or lack of jurisdiction" of the state.

Respectfully,

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